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R.J. REYNOLDS TOBACCO CO., *et al.*,

Petitioners,

v.

HOWARD A. ENGLE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The brief in opposition is remarkable for its near-total failure to defend the decision below or to deny its immense practical impact. Instead, respondents struggle to obscure the issues presented for review by manufacturing claims of waiver and seriously distorting the record. These diversionary tactics cannot change the essential facts: petitioners fully preserved their due process and preemption arguments; the Florida Supreme Court's preclusion ruling is a final judgment that has such significant consequences and is so manifestly wrong that it merits immediate review; and the preemption issue is important, the subject of considerable lower-court confusion, and readily resolved without wading into the factual record. Certiorari is warranted.

1. Due Process. In contending that the Court should indefinitely defer consideration of petitioners' due process claim, respondents make three unpersuasive arguments. First, they suggest that the Court lacks jurisdiction to review the Florida Supreme Court's ruling that the Phase I findings be given preclusive effect because that directive was only a "statement" in the opinion and not a part of the actual "judgment." BIO 12. This argument is flatly inconsistent with respondents' own prior pronouncements. On rehearing in the Florida Supreme Court, respondents proclaimed that the court's "Final Judgment addresses and incorporates the Phase I findings"; that those findings "have all the indicia of finality for purposes of appellate review"; and that the findings "constitute an *integral and necessary part of the verdicts and final judgment in favor of the Class Representatives*." Petitioners' Florida Engle Class Response to Respondents' Motions for Rehearing at 17 (emphasis added).

Respondents' about-face also exhibits a profound misunderstanding of what constitutes a "judgment" reviewable under § 1257. A "judgment" is a "court's final determination of the rights and obligations of the parties in a case." BLACK'S LAW DICTIONARY (8th ed. 2004). That definition

applies to the Florida Supreme Court's declaration that the Phase I findings are to be "given res judicata effect in any subsequent trial between individual class members and the defendants." Pet. App. 44a-45a.[1] Respondents try to avoid this conclusion by suggesting (BIO 12) that there can be no judgment for a party unless a court also awards damages or injunctive relief. That is plainly wrong. This Court has long recognized that it "is not necessary, in order to constitute a judicial judgment, that there should be both a determination of the rights of the litigants and also power to issue formal execution to carry the judgment into effect." *Old Colony Trust Co.* v. *Comm'r of Internal Revenue*, 279 U.S. 716, 725 (1929); see also *Fidelity Nat'l Bank & Trust Co.* v. *Swope*, 274 U.S. 123, 132 (1927). There is no question, for instance, that declaratory judgments are subject to review as soon as they issue. See *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249 (1933). So long as there is a "real, not a hypothetical controversy, which is finally determined by the judgment below," this Court can review a state court's declaratory ruling without issuing an advisory opinion. *Id.* at 264.

That is the situation here. The preclusion ruling is a "definitive determination of the legal rights of the parties" (*Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 241 (1937)), made in the midst of a controversy that is anything but "hypothetical." Former class members are already filing new suits against petitioners, in which they assert that the Florida Supreme Court's decision has eliminated their customary burden of proof. Pet. 18 n.8.[2] Under these circumstances, a

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[1] Indeed, respondents themselves have gone so far as to say that the court's decision "finally determined the rights of all parties with respect to the Engle class action litigation." Florida Engle Class Response To All Appellants' Motions Regarding Proceeding on Remand at 2.

[2] Since the filing of the BIO, complaints have been filed on behalf of approximately 600 former class members. Like those discussed in the petition (at 18 n.8), these complaints assert that the preclusion ruling establishes *all* elements of plaintiffs' claims except for causation and damages.

decision by this Court would "directly affect[]" petitioners' "valuable legal rights" that are "threatened with imminent invasion." *Wallace*, 288 U.S. at 262. The fact that petitioners may assert due process objections in subsequent cases does nothing to change the situation. Just last Term, the Court held that a decision can be a "judgment" (and thus reviewable) even though it provides an "advanced ruling[] on matters that would be addressed in a future case." *MedImmune, Inc.* v. *Genentech, Inc.*, 127 S. Ct. 764, 771 n.7 (2007).

Second, respondents suggest that the Court should wait for the preclusion ruling to be applied in the follow-on cases. BIO 10-11. Such delay is both unnecessary and imprudent. To begin with, there is no way to give preclusive effect to general Phase I findings in individual cases without violating due process.[3] Although individual class members' legal and factual claims may differ, the due process problem with applying preclusion is identical and insurmountable. That issue thus is ripe for decision now and will not be made easier by being embedded in any particular follow-on case. Cf. *Whitman* v. *American Trucking Assn's*, 531 U.S. 457, 479 (2001). Under these circumstances, there is no practical reason to

[3] Respondents' efforts to defend the merits of the preclusion ruling are anemic. First, petitioners' claim is not a "disguised Seventh Amendment re-examination argument." BIO 10 n.10. Indeed, this Court has expressly found that the Due Process Clause forbids giving preclusive effect to verdicts that, like the ones below, rest inconclusively on any of several grounds. Pet. 13-14. Similarly, it is irrelevant that petitioners may "have fully defended through trial and appeal." BIO 13. In *Fayerweather* v. *Ritch*, 195 U.S. 276 (1904), and all the other cases recognizing similar limitations on the use of preclusion, a party's participation in the trial has never been sufficient to give preclusive effect to an ambiguous verdict. Finally, although courts have allowed preclusion where the facts found in the first case *could* be determined by examining the record (BIO 13 n.13, 15 n.17), that only highlights the problem in this case. Here, *neither* the Phase I verdicts *nor* the record provides any way of determining which of respondents' alternative factual claims the jury actually accepted.

wait to undo the serious harm that the Florida Supreme Court's ruling produces.[4]

To the contrary, there are compelling reasons *not* to wait, as any delay would be highly inefficient and unfair. The decision below confronts petitioners with an immediate and tangible hardship: the specter of an untold number of suits across Florida, all of which petitioners will be forced to defend with one hand unconstitutionally tied behind their backs. Moreover, the very existence of the ruling below serves as a catalyst for such litigation, causing former class members to believe that they can recover from petitioners without having to prove most of their case. Plaintiffs' lawyers have estimated that no fewer than 35,000 individual cases will be filed before the one-year filing period ends next January. See Memorandum in Support of Motion for Remand at 11, *Caprio* v. *R.J. Reynolds Tobacco Co.*, No. 07-20712 (S.D. Fla. Apr. 6, 2007). These cases all will be premised on the same unconstitutional judgment. Waiting to correct that obvious defect until such litigation runs its course thus would impose a considerable and needless burden, not just on petitioners but also on the state and federal judicial systems in Florida.[5] Prudent exercise of this Court's review power calls for considering, not disregarding, this reality.

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[4] Respondents' reliance on Justice Stevens' opinion concurring in the dismissal of *Nike, Inc.* v. *Kasky*, 539 U.S. 654 (2003), thus is misplaced. *Nike* involved a "difficult" and "novel[]" constitutional question, the "correct answer" to which required the study of a "full factual record." *Id.* at 663-64. The question raised here, in contrast, is straightforward and readily resolved now. This case is analogous to *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494, 500 (1931), in which the Court held that the limited retrial ordered by the lower court, but that *had not yet taken place*, "would amount to a denial of a fair trial." Just as the Court in *Gasoline Products* did not wait for the deficient proceeding to occur before interceding, it need not and should not wait here.

[5] To the extent the litigation is successful because of this due process violation, it would expose petitioners to the kind of "potential liability" that

Third, respondents assert that petitioners did not preserve their objections to the generalized Phase I jury findings. BIO 13-17. This claim is based on significant distortions of the record, which clearly shows that petitioners objected to the verdict form at every opportunity.[6] In Phase I, after both sides had submitted proposed verdict forms, petitioners argued that unless the verdicts identified the precise content of the jury's findings, they would be "useless for application to individual plaintiffs in this case." App. C, *infra*, 30a, 34a, 35a-36a, 37a, 43a.[7] When the court promulgated a verdict form that failed to require findings specific enough to clarify precisely what the jury found, petitioners made the same objection. R.49493-49532. Petitioners also opposed a secondary proposal made by respondents (Apps. D & E, *infra*) that was *even worse*. But that hardly means that petitioners "preferred" the final form (BIO 17) – a claim flatly contradicted by the record. Indeed, the very transcript on which respondents rely makes plain that petitioners never abandoned their basic objections to the verdict form or their insistence on greater specificity. App. A, *infra*, 109a-110a. There was nothing remotely resembling a waiver here.[8]

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is "a strong factor in deciding whether to grant certiorari." *Fidelity Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051 (2006).

[6] To aid review, we have appended record material that illustrates some of respondents' most significant distortions. App. F, *infra*.

[7] See also App. F, *infra*, 102a (petitioners' argument that if "you merely ask this jury whether the defendants made a misstatement of a material fact, and they are not required to identify what it is, when you go into the Phase II and Phase III trials of the individual smokers' claims, that finding will have no meaning"); *Id.* at 101a (same argument as to design defect findings); *Id.* at 102a ("I can't figure out what we do with a finding that some defendant at some time made some misstatement of fact.").

[8] On appeal, petitioners renewed their objections, arguing that giving effect to the Phase I findings in the trials of individual plaintiffs would violate due process. App. K, *infra*. Although respondents asserted the same waiver arguments made here (App. I, *infra*), no state court ever so much as *hinted* that the due process challenge had been waived, and the Florida

Nor are respondents helped by arguing that a party who objects to a generalized verdict form must "propose and offer a form with the requisite findings." BIO 16 n.21. Petitioners *did* offer such an alternative, which would have called for the jury to enumerate the specific factual bases for its findings. Apps. B & C, *infra*. As respondents observe (BIO 15-16 & n.18), "blank-line" verdict forms often may not be necessary to provide adequate specificity, but that does not mean that such a form, or some other effective means of specifying the jury's findings, was not a necessary predicate to preclusion *in this case*, given the wide diversity of claims and evidence presented in Phase I. The special nature of Phase I demanded, at a minimum, a verdict form that was up to the challenge. The one used here simply was not.[9] And whatever "broad discretion" judges have to fashion verdict forms (BIO 16), ambiguous verdicts still may not be given preclusive effect where due process forbids it. That respondents and the Florida courts chose to disregard petitioners' repeated invocation of that bedrock rule does not indicate waiver, but is instead the very reason certiorari is warranted.

2. Preemption. Respondents do not defend the Florida courts' refusal to enforce preemption, but instead fabricate a series of procedural obstacles that cannot withstand scrutiny.

To begin, respondents contend that petitioners failed to preserve the preemption argument in the Florida courts. BIO 18-21. This contention is belied by the record and misstates Florida's settled appellate procedure. Petitioners raised preemption objections throughout the trial (*e.g.*, T.16400-01,

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Supreme Court in fact proceeded to invalidate certain of the Phase I findings. Pet. App. 3a.

[9] Respondents thus miss the point in assigning significance to the fact that the trial court used a "special interrogatory verdict form." BIO 13 & n.14. It is irrelevant whether the jury returned a "general" or "special" verdict. What matters is whether the verdict allows courts to identify which of respondents' alternative factual claims the jury accepted. The Phase I verdict does not -- and respondents do not even pretend otherwise.

18708-19, 27957-58, 42383-84) and in post-trial motions, which the trial court ultimately rejected. Pet. App. 138a-139a. Petitioners then argued preemption at length to the Court of Appeal. App. J, *infra*. That court did not decide the issue because it gave complete relief to petitioners on other grounds. This set the stage for *respondents'* Florida Supreme Court appeal. That court's stated general practice is to avoid addressing alternative grounds for affirmance left undecided by the intermediate appellate court, and, upon a reversal, to remand so that the latter court can address those alternatives first.[10] The Florida Supreme Court *never* has endorsed the inefficient and senseless rule that an appellee must, on pain of waiver, brief in detail every alternative basis for affirmance that was presented but not reached below.[11] In keeping with the court's practice, and in an abundance of caution, petitioners informed the Florida Supreme Court that they had raised additional points of error (including preemption) in the Court of Appeal. Petitioners observed that those points "provide additional, alternative grounds" for affirmance "or would require further proceedings upon remand." App. K, *infra*. This reminder was sufficient to apprise the court "of the nature or substance" of the preemption argument "at the time and in the manner required by the state law." *Webb* v. *Webb*, 451 U.S. 493, 501 (1981).

Moreover, petitioners continued to press the preemption issue after the Florida Supreme Court ruled, seemingly with-

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[10] *E.g.*, *Rosen* v. *Fla. Ins. Guar. Ass'n*, 802 So. 2d 291, 295 n.6, 298 (Fla. 2001); *Provident Mgmt. Corp.* v. *City of Treasure Island*, 718 So. 2d 738, 740 (Fla. 1998); *Florida* v. *Norstrom*, 613 So. 2d 437, 441 (Fla. 1993).

[11] The cases cited by respondents (BIO 19 & n.25) are entirely different. All involve an *appellant's* failure adequately to present arguments for *reversal*. Similarly, in *Beck* v. *Washington*, 369 U.S. 541, 552-53 (1962), the petitioner omitted the waived argument *both* in the "assignments of error" required by state law *and* in his petition for rehearing.

out deciding preemption.[12] On rehearing, petitioners asked the Supreme Court to "clarify" that the Court of Appeal should decide that issue or, alternatively, to "state" that it had already "considered and rejected defendants' arguments." App. M, *infra*. The court did neither. And petitioners' subsequent request to the Court of Appeal to address preemption was denied without comment. App. N, *infra*. Under these circumstances, there is no doubt that the state courts "have been afforded a fair opportunity to address the federal question that is sought to be presented here." *Webb*, 451 U.S. at 501; see also *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928). Indeed, no Florida court has ever *suggested* that petitioners waived or otherwise failed adequately to present their preemption argument.

Next, respondents assert that addressing preemption would require wading through a voluminous evidentiary record. That is not so. The Florida courts' failure to protect petitioners against preempted claims can be identified and corrected by this Court without any "factual determinations on disputed points." BIO 24. Two aspects of the proceedings are dispositive in this respect. The first is the trial court's fatally flawed jury instructions. During Phase I, the jury was told that "federal law does not limit the liability of any defendant against claims based on," *inter alia*, "negligence," "fraud," and "misrepresentation." T.37569-70. This instruction was patently wrong. Pet. 26-28. Compounding that error, the trial court refused petitioners' request in Phase I to instruct the jury that claims based on a neutralization theory are preempted and that failure to warn and neutralization claims are

[12] In a remarkable example of trying to have it both ways, respondents assert (BIO 19 n.24) that the Florida Supreme Court *did* decide the preemption question when it stated that compliance with the federal warnings "did not eliminate" any Phase I cause of action other than failure to warn (Pet. App. 38a). To the extent respondents are right, that is "sufficient" to bring the preemption issue before this Court, regardless of whether it was properly presented below. *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974).

preempted even if packaged as "concealment" claims. Pet. App. 190a-191a.[13] These basic instructional errors allow the Court to decide the preemption issue simply by interpreting the Labeling Act without having to make factual determinations or perform a detailed examination of the record.[14]

That the failure to give a proper preemption instruction affected the judgments is confirmed by the Phase I findings. The most obvious example is the concealment finding, which shows that the jury accepted claims predicated on the theory that petitioners failed to disclose information about the health effects or addictive nature of cigarettes. Pet. App. 197a. These were classic failure-to-warn claims and unquestionably would have been preempted had they been identified as such. Pet. 21-22. Respondents tried to avoid that result by presenting their claims as targeting "fraudulent" conduct. Having rejected the instruction proposed by petitioners to prevent that evasion, the trial court went on to endorse respondents' maneuver as a matter of law. Pet. App. 139a. Not only did the Florida Supreme Court fail to correct this error, respondents themselves read the court's decision as *accepting* the trial court's flawed reasoning. *Id.* at 38a. Thus, contrary to re-

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[13] As even a cursory examination of the language quoted by respondents reveals, it is simply incorrect to assert that petitioners' proposed instruction suggested that "all claims against tobacco companies are barred after July 1, 1969." BIO 21. Moreover, respondents' observation that the *Phase II-A* instruction mentioned neutralization is beside the point, given that (1) the Phase I instruction ignored neutralization (thus contaminating both the Phase I findings and the individual judgments, which the jury in Phase II-A was expressly instructed to base on the Phase I findings (see T.50235-243; App. H, *infra*)); and (2) both instructions incorrectly told the jury that preemption did not apply to certain categories of claims.

[14] In this respect, this case closely resembles *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057 (2007), in which this Court relied on the failure to give a proposed jury instruction in order to reverse without having to comb through the factual record.

spondents' contention (BIO 28), preemption clearly has been sidestepped here through the manipulation of labels.[15]

As a result, this case squarely raises the post-*Cipollone* division as to whether preemption can be circumvented by labeling otherwise preempted claims as "fraud" or "concealment" claims. Respondents do not even attempt to dispute that the courts are hopelessly confused on that question or to minimize its practical significance. Cf. PLAC *Amicus* Br. 9-17; Professors' *Amicus* Br. 2-5. Now that respondents Farnan and Della Vecchia have renounced any claim to punitive damages (see BIO 2 n.3), there is no conceivable jurisdictional obstacle to deciding the issue here (or to using the GVR procedure), and doing so would have a significant impact not only on this case and all follow-on cases, but on smoking and health litigation generally. Denial of review, in contrast, will only prolong the confusion and clog the courts with new claims that Congress intended to preclude.

The petition for a writ of certiorari should be granted.

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[15] These preemption errors infect the Phase I findings and thus contaminate the claims of *all* class members, not just Farnan's and Della Vecchia's individual judgments. Nevertheless, respondents argue – again relying on labels – that a ruling in petitioners' favor on preemption would not affect those individual judgments because they rest in part on misrepresentation claims that are not preempted. BIO 29. But the fraud claim made by those plaintiffs was based in large part on assertions that petitioners neutralized the federally mandated warning labels, for example by marketing certain brands as "lights" and by using so-called glamour advertising. App. G, *infra*. As courts have recognized, "fraud" claims based on such neutralization theories *are* preempted. *E.g.*, *Brown* v. *Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 391-93 (5th Cir. 2007).

Finally, respondents argue that this Court's review of preemption cannot affect the individual judgments because those judgments are supported by findings of pre-July 1, 1969, breach of implied warranty and negligence. BIO 20-21 & n.26. In fact, however, there are no such findings. Although Phase I included findings of pre- and post-July 1, 1969, breach of implied warranty and negligence, in Phase II-A, respondents sought and obtained a verdict form that prevented the jury from indicating the timing of the injurious conduct. App. I, *infra*, at 137a-140a.

Respectfully submitted.

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